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In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

The Federal Communications Commission respectfully asks the Court to reverse the judgment of the court of appeals in this case insofar as that court (1) set aside a Commission decision, at the close of rule making, not to break up existing co-located newspaper-broadcast station combinations except in cases of effective monopoly, and (2) required the Commission on remand to order across-the-board dissolution of all such combinations subject only to waiver in exceptional circumstances.

OPINIONS BELOW

The opinion of the court of appeals (App. 339) [1] is reported at 555 F. 2d 938. The order granting in part the Commission's

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[1] "App." citations refer to the joint appendix produced by the petitioners in this case and in five consolidated cases.

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motion for stay of mandate (App. 435) is reported at 555 F. 2d 967. The orders of the Commission (App. 134, 317) are reported at 50 FCC 2d 1046 and 53 FCC 2d 589.

JURISDICTION

The court of appeals entered judgment on March 1, 1977 (App. 432). A partial stay of mandate was granted on April 5, 1977 (App. 435). The Commission filed its petition for certiorari on April 22, 1977, within the allotted time, invoking this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). This Court granted the writ on October 3, 1977, and consolidated the case with Nos. 76–1521, 76–1595, 76–1604, 76–1624 and 76–1685.[2]

QUESTIONS PRESENTED

Whether the Federal Communications Commission lawfully and reasonably determined that, in the absence of a showing of harm, the public interest did not justify rules requiring divestiture by existing, previously approved, co-located newspaper-broadcast combinations, except in cases of effective local media monopoly.

Whether the court of appeals exceeded the proper role of a reviewing court by substituting its judgment for that of the Commission and directing the agency to adopt rules ordering divestiture by all existing co-located newspaper-broadcast combinations, subject only to waiver in individual cases.

STATUTES AND REGULATIONS INVOLVED

The statutes involved are Sections 2(a), 4(i), 4(j), 301, 303(g), 303(r), 307(a), 307(d), 308(a), 309(a) and 309(d)(1) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 152(a), 154(i), 154(j), 301, 303(g), 303(r), 307(a), 307(d), 308(a), 309(a) and 309(d)(1); and Section 10(e) of the Administrative Procedure Act, 80 Stat. 381, as

[2] In two of these cases, Nos. 76–1595 and 76–1604, the Commission is named as a respondent. In this brief, the Commission appears only as petitioner in No. 76–1471. Its response in the related cases will be submitted in due course.

amended, 5 U.S.C. § 706. The Communications Act provisions are set forth at App. 27–32. The pertinent regulations of the Federal Communications Commission, 47 C.F.R. §§ 73.35, 73.240 and 73.636, are set forth at App. 243 and 337.

STATEMENT

The FCC adopted new multiple ownership rules and policies in 1975 to govern its consideration of applications for radio and television licenses. For the first time, its rules dealt with the licensing of broadcast stations to owners of co-located newspapers—a matter the Commission had addressed up to that time on an *ad hoc* basis. The new rules and policies barred the creation of new co-located newspaper-broadcast combinations, and they required dissolution within five years of existing combinations which constituted effective monopolies of local mass communications media. The Commission did not require divestiture in communities where a newspaper-broadcast combination faced competition from another local newspaper or broadcast station. *Second Report and Order* (Docket No. 18110), 50 F.C.C. 2d 1046 (App. 134).

The court of appeals affirmed the prospective rules barring creation of new combinations. It invalidated those parts of the rules and decision which declined to break up existing combinations in non-monopoly communities and which required dissolution of such combinations in monopoly communities. The court of appeals held that the FCC could not confine its divestiture requirement to monopoly situations, but that it must adopt rules on remand requiring dissolution of all co-located newspaper-broadcast combinations unless it can find exceptional circumstances in particular cases warranting waiver. 555 F. 2d 938 (App. 339).

The Commission and other parties below petitioned this Court for a writ of certiorari to review the decision below insofar as it invalidated the rules and policies governing existing local newspaper-broadcast combinations. Some other parties petitioned for review of the decision also insofar as it af-

firmed the prospective bar to new combinations. The Court granted all the petitions by order of October 3, 1977.

In this statement, we set forth briefly (1) the statutory and historical background for the Commission's action before discussing (2) the cross-ownership decision itself and, finally, (3) the decision of the court of appeals.

I. BACKGROUND

The FCC regulates broadcasting under a statutory scheme that requires broadcasters to apply for and obtain initial licenses and periodic renewals on findings by the agency that grant of the applications will serve the public interest, convenience and necessity. 47 U.S.C. §§ 302, 307(a) and (d), 308 (a), 309(a) and (d). The Communications Act requires the FCC to make the statutory public interest findings as to each application; but it also authorizes the adoption of general rules and policies to govern actions on individual applications, subject to waiver in exceptional circumstances. 47 U.S.C. §§ 154 (i), 303(r). *See, e.g., United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202–206 (1956).

A. DIVERSIFICATION AS A PUBLIC INTEREST FACTOR

Diversification of ownership of broadcast facilities has been a policy goal almost since the FCC came into existence in 1934, as part of its perception of the public interest. In the early 1940s, the Commission adopted rules prohibiting ownership or control by a single licensee of more than one station in each broadcast service (AM or FM radio or television) in the same geographic area.[3] Similarly, but without regard to the location of the stations, the Commission has adopted rules

[3] *Multiple Ownership of Standard Broadcast Stations* (AM radio), 8 Fed. Reg. 16065 (1943); *Rules and Regulations Governing Television Broadcast Stations*, 6 Fed. Reg. 2284 (1941); *Rules Governing High Frequency Broadcast Stations* (FM radio), 5 Fed. Reg. 2382, 2384 (1940); *Multiple Ownership of Standard, FM and Television Broadcast Stations*, 45 FCC 1476 (1964).

limiting the total number of broadcast outlets in each service which a single licensee can own or control.[4]

Both sets of rules "seek to promote maximum diversification of program and service viewpoints and to prevent undue concentration of economic power contrary to the public interest." [5] Similarly, the Commission has recognized diversification as a "factor of primary significance" in initial comparative licensing decisions involving applicants for new licenses.[6] But it is not the only consideration in determining where the public interest lies, either in specific licensing adjudications or in statements of broad policy to govern such adjudications. The Commission in 1965 summarized its "primary objectives" in choosing among applicants for a broadcast license as "first, the best practicable service to the public, and, second, a maximum diffusion of control of the media of mass communications." [7]

[4] *Multiple Ownership of AM, FM and Television Broadcast Stations*, 18 FCC 288 (1953). This Court sustained the Commission's authority to adopt multiple ownership rules in *United States* v. *Storer Broadcasting Co., supra.* On remand from this Court, the District of Columbia Circuit sustained the specific limits the Commission had established on the ground that they were based on the Commission's experience, "coupled with a design to avoid undue disruption of existing station ownership." *Storer Broadcasting Co.* v. *United States*, 240 F. 2d 55, 56 & n. 3 (1956).

[5] *Multiple Ownership of Standard, FM and Television Broadcast Stations, supra*, 45 FCC at 1476–77.

[6] *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965). The 1965 policy governs only comparative hearings on applications for initial licensing. For the most recent statement of Commission policy on comparative renewal hearings, see *Policies Relating to the Broadcast Renewal Applicant*, 40 Pike & Fischer Rad. Reg. 2d 763, 776 (1977), *review pending sub nom. National Black Media Coalition* v. *FCC*, No. 77–1500, D.C. Circuit, and *Cowles Florida Broadcasting, Inc.*, 62 FCC 2d 953, 955–957 (1977), *appeal pending sub nom. Central Florida Enterprises, Inc.* v. *FCC*, No. 76–1742, D.C. Circuit.

[7] *Id. See also Federal Communications Comm.* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) ("An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts.").

B. NEWSPAPERS AS BROADCAST LICENSEES

The Commission never regarded its policy generally favoring diversification of ownership and control as a barrier to its granting licenses to newspaper owners when, in its judgment and on consideration of all relevant factors, a grant would serve the interest of the public. Many newspaper owners contributed to the development of the broadcast industry as pioneers in a new technology that was adaptable to many of the same news dissemination functions the newspapers had long performed. In the early days of both radio and television, when there was a shortage of competent applicants, the Commission even encouraged newspaper publishers to enter broadcasting because their performance generally could be relied upon and they would bring strong journalistic traditions to the new medium. The Commission has repeatedly renewed the licenses of newspaper-broadcast cross-owners on findings that they have served the public.[8]

The Commission has long recognized, however, that newspaper-broadcast combinations may raise problems of media concentration. In the early 1940s, at the same time the Commission was adopting rules limiting licensees to a single station in each service in a given geographical area,[9] it considered similar proposed rules for newspaper-radio cross-ownership in an extensive rule making proceeding. The Commission terminated the proceeding without adopting rules, concluding that the "grave legal and policy questions involved" made it inadvisable to bar such combinations by rule. Reaffirming the "general principle that diversification of control of such media is desirable," the Commission decided to continue resolving the public interest questions of newspaper-radio cross-ownership on a

[8] 555 F. 2d at 945 (App. 356); 50 FCC 2d at 1074–75 (App. 190). See also *Multiple Ownership of Standard, FM and Television Broadcast Stations* (Docket No. 18110), *Further Notice of Proposed Rulemaking*, 22 FCC 2d 339, 350 (concurring and dissenting statement of Chairman Burch) (App. 124), 351 (concurring statement of Commissioner Lee) (App. 125); *Policy Statement on Comparative Broadcast Hearings, supra*, 1 FCC 2d at 405 (concurring statement of Commissioner Lee).

[9] See p. 4 & n. 3, *supra*.

case-by-case basis.[10] That practice continued until the Commission adopted the rules that are under review in these cases.

Congress never has adopted legislation specifically addressing newspaper-broadcast combinations, although it has considered such legislation.[11] Nor have the courts required any particular approach to cross-ownership,[12] although in recent cases, during the pendency of the Commission's rule making proceeding, they approved the agency's practice of deferring consideration of structural cross-ownership questions to await the outcome of the rule making in Docket No. 18110.[13] The Commission's newspaper-broadcast cross-ownership policy thus has evolved administratively as the broadcast industry has matured, its most recent statement coming in the rules now under review.

As this policy has evolved and as the industry has matured, there has been a substantial decrease in recent years in both the percentage of television stations owned or controlled by local newspapers and the absolute number of co-located newspaper-television combinations. In 1950, 40.2% of the nation's commercial television stations were commonly owned or controlled with newspapers published in the same community. By

[10] *Newspaper Ownership of Radio Stations* (Notice of Dismissal of Proceeding), 9 Fed. Reg. 702, 703 (1944). The Commission forwarded a summary of the evidence it had compiled in its rule making proceeding to the appropriate committees of Congress to inform them of the facts and "for any consideration which they may desire to give to the matter." *Id.*

[11] *E.g., H.R. Rept. No. 2426* (Conference Report), 82d Cong., 2d Sess. 18–19, July 1, 1952 (conference committee omitted House provisions forbidding "discrimination" against newspaper owners in licensing decisions, stating that the FCC was not authorized to "discriminate" against an applicant because of its interest in a newspaper).

[12] *See Pinellas Broadcasting Co.* v. *FCC*, 230 F. 2d 204, 208–209, and n. 6 (D.C. Cir.), *cert. denied*, 350 U.S. 1007 (1956). This Court did say, in dictum, that the public interest standard might permit denial of a license application "when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communication." *United States* v. *Radio Corp. of America*, 358 U.S. 334, 351–52 (1959).

[13] *E.g., Columbus Broadcasting Coalition* v. *FCC*, 505 F. 2d 320, 324–25, *reh. denied*, 505 F. 2d 330 (D.C. Cir. 1974).

1969, the percentage had declined to 14.1, although the number of combinations had more than doubled. When the FCC adopted its *Second Report and Order* in Docket No. 18110, the percentage was only 10.4. A decline in absolute numbers began after a peak in 1955. In that year, 127 television stations were in co-located combinations with newspapers. By the end of the Commission's proceeding in Docket No. 18110, there were only 79 such combinations.[14]

II. THE COMMISSION DECISION

The Commission opened a proceeding in 1968 looking toward the adoption of prospective rules that would bar ownership of more than one station of any kind in a single market. The proposed rules, known as the "one-to-a-market rules," would not have required divestiture, but were to govern applications for initial licenses and applications for transfer of licenses to new parties. The notice of proposed rulemaking did not address newspaper-broadcast combinations.[15]

The Commission issued its *First Report and Order* in Docket No. 18110 in 1970, adopting the prospective rules essentially as proposed.[16] At the same time, it issued a *Further Notice of Proposed Rulemaking* to consider whether changed circumstances warranted either a prospective ban on co-located newspaper-broadcast combinations or dissolution of existing radio-television and newspaper-broadcast combinations through

[14] Comments of the American Newspaper Publishers Ass'n in Opposition, App. E, Table IV, filed April 2, 1971; *Second Report and Order*, 50 FCC 2d at 1061, 1080 n. 29 (App. 163–64, 200–02). *Second Report and Order*, App. D., 50 FCC 2d at 1098 (App. 242). Since the record closed in the FCC's proceeding, transfers of either newspapers or television stations have reduced the number of co-located combinations still farther to 65. Three additional applications to transfer television stations are pending before the FCC, and, if granted, they would bring the number of newspaper-television combinations to 62. The FCC's order would have broken up seven more of those combinations within five years. Comparable figures are not readily available for newspaper-radio combinations, but the trend is the same.

[15] *Multiple Ownership of Standard, FM and Television Broadcast Stations* (Docket No. 18110), 33 Fed. Reg. 5315.

[16] 22 FCC 2d 306 (App. 33).

divestiture.[17] The Commission invited comment on whether either of these courses of action was necessary to promote diversity or was otherwise required by the public interest. The Commission also expressed concern about the potential disruptive effects of divestiture, and invited comment on that aspect of the proposed rules.[18]

The *Further Notice* raised widespread interest and prompted filings and other participation by some 200 parties.[19] Participants included broadcast and newspaper interests, public interest groups, academic and other research entities, and the Antitrust Division of the Department of Justice. A number of studies were submitted supporting various policy viewpoints,[20] and the Commission heard three days of oral argument by all participants who requested time.[21]

The comments—and the Commission's analysis—had two principal threads: antitrust policy and broadcast regulation under the public interest standard. The antitrust policy arguments focused on the question whether there was undesirable concentration in some identifiable advertising market. The arguments relating to broadcast service and urging divestiture concentrated on diversification of control of information sources as a means of informing the public about local news and interests and providing outlets for local expression. Those supporting the Commission's proposed divestiture rules focused on the potential for abuse from common ownership to limit competition or propagandize, but there was no showing of any pattern of abuse from existing cross-ownerships.[22] Indeed, those supporting the proposed rules relied almost entirely on theoretical and policy arguments.[23] Those opposing the proposed rules

[17] 22 FCC 2d 339 (App. 101).

[18] *Id.*

[19] *Second Report and Order*, Appendix A, 50 FCC 2d at 1090–92 (App. 221).

[20] *Id.*, Appendix B, 50 FCC 2d at 1093–94 (App. 226).

[21] *Memorandum Opinion and Order*, 45 FCC 2d 768, 770 (1974) (App. 127). *See* Transcript of oral argument in Docket No. 18110.

[22] 50 FCC 2d at 1056, 1072–73 (App. 153, 186). See 50 FCC 2d at 1056–1074 (App. 153–188).

[23] *Id.*

argued that newspapers and broadcast stations do not compete in the same product market, that there is an abundance of competition in the relevant geographic markets, that there is no showing of economic power from cross-ownership, that widespread divestiture would have an undesirable economic impact, that cross-ownership does not mean that the two entities speak with the same voice, and that common ownership contributes to better service.[24]

The Commission gave due consideration to antitrust policy; but its primary concern in developing diversification rules was the interest of the public in good local broadcast service.[25] The studies attempting to show an affirmative need for broad divestiture were inconclusive and, in some cases, unrealistic. Nor did the studies on the other side demonstrate a continuing need to encourage new newspaper-broadcast combinations.[26] Accordingly, although it found guidance and support for its decision in the studies, the Commission relied primarily upon policy considerations in devising its prospective rules and in determining where to draw the line on divestiture.

A. PROSPECTIVE RULES

Finding changed circumstances which no longer required it to encourage or even permit new licensing of newspaper-broadcast combinations, the Commission adopted a flat prospective ban against new cross-ownerships, whether created by initial

[24] *Id.*

[25] 50 FCC 2d at 1048, 1078–81 (App. 138–39, 196–203).

[26] *Id.*, 50 FCC 2d at 1058, 1072–74, 1079 nn. 27 & 28, 1115 (App. 157–58, 185–88, 199–200, 281–83). The court of appeals agreed on review that the studies had provided "little reliable 'hard' information" and that they were "largely inconclusive." 555 F. 2d at 956–57 (App. 395–96). One study, by the Commission's own staff, found "an undramatic but nonetheless statistically significant" superiority in newspaper-owned television stations as to several categories of local programming. 50 FCC 2d at 1078 n. 26 (App. 198; *Id.*, App. C, 50 FCC 2d at 1094–98 (App. 230–41). See also Baer, Geller & Grundfest, *Newspaper-Television Cross-Ownership: Options for Federal Action* v, 23, 39–42 (1974).

application and construction or by acquisition.[27] This was not a reflection on the efforts of existing combination owners in diligently serving the public interest.[28] Instead, it was simply based on an effort to advance the Commission's long-standing policy of promoting diversification of ownership in the hope that it would offer diversity in the marketplace of ideas—a "worthwhile" goal not dependent on its being "urgent to be justified." [29] The Commission conceded that diversification of ownership offers no guarantee that this will result in diversity of viewpoints.[30] However, in the case of future licensing, if there was even a small gain in diversity it was worth pursuing—there would be no disruption of existing service and therefore the Commission could singularly focus on the abstract goal.[31]

The "changed circumstances" on which the Commission relied were the maturity of the broadcast industry, the fact that newspapers no longer were the "sole reservoir" of relevant experience, and the scarcity of available channels remaining open for new licensing. Without denigrating the contributions of newspaper owners to the development of broadcasting or suggesting that existing combinations were not serving the public interest, the Commission concluded that its rules should bar all new licensing that will not add to diversity. Since the prospective rules could foster diversity without the disruption that would attend dissolution of existing combinations, the Commission found no persuasive countervailing considerations that would require a less restrictive prospective rule.[32]

The rules operate this way: (1) a single party may not buy both parts of a co-located newspaper-broadcast combination; (2) if a broadcast licensee acquires a daily newspaper in the same market, it must dispose of its license within a year or by the time of its next renewal date, whichever comes later; and (3) no newspaper owner may obtain a license for a broadcast station in the same market, either by transfer or by original

[27] 50 FCC 2d at 1074–78 (App. 188–96).

[28] 50 FCC 2d at 1079 (App. 200).

[29] 50 FCC 2d at 1048, 1076 (App. 138–139, 193).

[30] 50 FCC 2d at 1076, 1078 (App. 193, 196–98).

[31] 50 FCC 2d at 1076 (App. 193).

[32] *Id.* The Commission did provide for waiver in exceptional circumstances. *Id.* at 1077 (App. 196).

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licensing.[53] The rules do not affect newspaper ownership of stations outside the community of publication.

B. EXISTING COMBINATIONS

The "most difficult" question for the agency was what to do about existing newspaper-broadcast combinations which had served the public well enough to obtain repeated license renewals and as to which the record contained no evidence of a pattern of abuse arising from cross-ownership.[54] In its *Further Notice*, the Commission had expressed its "substantial concern" that separation of existing newspaper-broadcast combinations might affect the quality of service "to be rendered by the individual units after divestiture. . . ." [55] Four years later, after considering the comments and studies it had received up to that time, the Commission asked for further comment and information on a number of questions, including:

> If divestiture is required, should it be required in all markets? Should it be limited to markets of a specified size, to those with a specified number of separate media voices, or to those with specific patterns of distribution of advertising revenues? Should it be otherwise tailored to respond to local variations which exist in different markets? [56]

The Commission was thus concerned that a sweeping divestiture rule might deprive the public of service by proven and conscientious licensees.

In the case of the prospective rule, the Commission enjoyed the luxury of pursuing the theoretical benefits of diversification of ownership singlemindedly. In the case of ordering divestiture of existing combinations, however, the Commission could not focus on the "abstract goal alone;" a "mere hoped for gain in diversity" was not enough.[57] This did not suggest a dimin-

[53] *Id.* at 1074–76, 1099–1107 (App. 188–93, 243–66).
[54] *Id.* at 1078–86, 1072–73 (App. 196–214, 186–88).
[55] 22 FCC 2d at 348 (App. 119).
[56] 45 FCC 2d at 769, 770 (App. 129–31).
[57] 50 FCC 2d at 1078 (App. 196–198).

ished importance for diversity; it simply meant that it was not the "only point to consider." [58] Since the extensive record did not disclose facts requiring divestiture by reason of any pattern of abuses arising from cross-ownerships, or otherwise, approaching the divestiture question became a matter of balancing various policy considerations. The benefits from diversification of ownership were only speculative, and therefore they had to be balanced against the disruption divestiture could cause, resulting in the loss of established owners who had offered a "long record of service to the public." [59] Risking disruption of service in the limited number of markets where there was no competition and no diversification was one thing; extending that risk across-the-board regardless of competition and diversity, the Commission concluded, was not warranted on the record and would cause serious public injury.[60]

In sum, the question as to existing combinations was different from the prospective one, in that there was no record of a pattern of abuse and substantial countervailing considerations had to be balanced against the potential gain in diversity from divestiture. The Commission decided that it could not justify across-the-board divestiture in those circumstances, and that its problem was to determine "how much diversity to seek in terms of providing the best practicable service to the American public." [61]

In the absence of a pattern of abuses, the Commission weighed two broad policy considerations which militated against across-the-board divestiture:

> 1. Possible diminution in the quality of broadcast service to the public as a result of:
>
> a. breaks in continuity of operation by licensees who had served their communities for a long time and were attuned to local needs and interests; [62]

[58] *Id.*
[59] *Id.*
[60] 50 FCC 2d at 1080 (App. 200–202).
[61] 50 FCC 2d at 1074, 1078–86 (App. 189–90, 196–213).
[62] *Id.* at 1078 (App. 197).

b. reductions in local ownership of broadcast stations; [43] and

c. possible local economic dislocations as a result of forced sales.[44]

2. Unfairness or hardship to individual licensees who had operated their stations well and were not shown to have abused their newspaper-broadcast operations.[45]

In view of the adverse considerations which could attend broad divestiture, the Commission chose to break up only those combinations which, in its view, constituted effective local monopolies.[46] Focusing on media that would deal with issues of local concern,[47] the Commission determined that it would require divestiture within five years (1) where the combination had the only local newspaper and the only radio station placing a city grade signal over the newspaper commu-

[43] A likely result of a broad divestiture order would have been "swaps" among cross-owners, resulting in absentee ownership of the stations that had been swapped. *Id.* at 1062–63, 1068–69 (App. 166–67, 178–79).

[44] *Id.* at 1078 (App. 197). The concern here was that sale of broadcast properties, even at prices that might be deflated somewhat by the "forced" divestiture, would be at such high prices that revenues which had been adequate in the past to support substantial investment in local programming and still produce a healthy return, might not even service the debt required to buy the stations. This might result either in a series of turnovers by owners who could not afford to take the loss, or in acquisition of many of the divested stations by conglomerates or other absentee owners. See Comments of American Newspaper Publishers Ass'n in Opposition, App. B, Study by Financial Consulting Unit of the First National City Bank.

[45] The Commission recognized that "it [was] not necessary to have proof of abuses" before it could require divestiture. 50 FCC 2d at 1080 n. 29 (App. 200–02). The absence of abuses, however, was a relevant consideration in striking the balance as the Commission did. *Id.* at 1089 (App. 219).

[46] The Commission also took into account the fact that cross-ownerships were declining both in absolute numbers and as a percentage of all stations. *Id.* at 1080 n. 29 (App. 200–02).

[47] National or regional magazines or newspapers, for example, even though they might circulate in the community, would not likely cover local issues. They were not considered in the determination of whether there were competing media voices. 50 FCC 2d at 1081–82 (App. 204–06).

nity (assuming no local television outlet), and (2) where the combination had the only local newspaper and the only television station placing a city grade signal over the newspaper community.[48] The divestiture order reaches seven television stations and nine radio stations.[49]

The co-located broadcast-newspaper combinations not subject to divestiture would still be subject to examination every three years at license renewal time to assure that they continue to operate in the public interest. The Commission, however, made plain in its order that it would not consider cross-ownership *per se* as an issue warranting a hearing on whether it should renew a license. Abuses of cross-ownership, such as economic monopolization or other conduct inimical to the public interest, still would be grounds for denial of a license renewal.[50]

On petitions for reconsideration, the Commission reaffirmed its rules and policies in all substantial respects.[51]

[48] The combination could sell either the paper or the station. A competing television station licensed to a community with a "monopoly" newspaper-radio combination would remove the requirement to divest, although communities with a single radio station are not likely to have television stations. A competing radio station in a "monopoly" newspaper-television community would not remove the divestiture requirement because of the obvious imbalance in influence and power between radio and television. *Id.* at 1080–84 (App. 202–10).

[49] *Id.*, Apps. D and E, at 1098 (App. 242).

[50] *Id.* at 1088–89 & n. 49 (App. 218–20).

[51] *Memorandum Opinion and Order*, 53 FCC 2d 589 (App. 317). While the Commission was considering cross-ownership, Congress was having hearings of its own on proposed legislation that included provisions dealing with newspaper-broadcast combinations. The House adopted legislation that would have forbidden the FCC from considering newspaper ownership at renewal time unless it had adopted rules addressing the matter. Both houses of Congress were aware of the FCC's proceeding. See *H.R. Rept. No. 93–961*, 93rd Cong., 2d Sess., March 26, 1974; *S. Rept. No. 93–1190*, 93rd Cong., 2d Sess., Sept. 27, 1974. See also *Congressional Quarterly Almanac* (Vol. XXX), pp. 714–17 (1974), for a summary of Congressional action on the legislation. Although Congress followed the Commission's proceeding closely, it took no action to change the result through legislation.

III. THE DECISION BELOW

Several parties sought review of the Commission's decision, attacking it from almost every conceivable point of view and challenging virtually every aspect of the new rules.[52] The court of appeals affirmed the prospective rules, holding (1) that a legislative type policy judgment intended to increase diversity was not arbitrary or capricious even though its benefits were speculative; [53] (2) that the Commission acted within its authority in restricting newspaper ownership of broadcast stations by rules; [54] and (3) that a rule forbidding the creation of co-located newspaper-broadcast combinations does not violate press freedoms guaranteed under the First Amendment.[55]

The court held further that the Commission had ample authority to require divestiture without evidentiary hearings on each license. It rejected the contention that divestiture was unfairly "retroactive," relying primarily upon the requirement in the Communications Act that licensees obtain renewals every three years. The court said that renewal applications were subject to the rules in effect at the time of renewal, so that the Commission could adopt rules that would affect future renewal actions on existing licenses. Thus, the court said,

> the contention that divestiture contains elements common to suspect retroactive legislation goes not to the existence of Commission authority, but rather to the reasonableness of its exercise.[56]

On the reasonableness of the specific divestiture rules adopted, however, the court's approach differed from that of the Commission. Although recognizing that the Commission had to rely primarily on policy considerations,[57] it overturned both the rules requiring divestiture in situations of effective

[52] The petitioners invoked the jurisdiction of the court of appeals pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).
[53] 555 F. 2d at 948–51 (App. 365–74).
[54] *Id.* at 951–52 (App. 374–81).
[55] *Id.* at 953–55 (App. 381–88).
[56] *Id.* at 955 (App. 390).
[57] *Id.* at 957 (App. 396).

monopoly and the determination not to require general divestiture of newspaper-broadcast combinations.[58]

The court of appeals held that the Commission had erred because, once having decided to promote diversity through its prospective rules, it had not also adopted an overall and virtually irrebuttable presumption that "cross-owned stations do not serve the public interest." [59] Although the court agreed with the Commission that the record, including the numerous studies, was inconclusive on the question of actual harm or abuses arising from cross-ownership,[60] it did not accept the Commission's balancing of other public interest factors against the "hoped for gain" in diversity. It held, rather, that the Commission "erred in concluding that the other policies it advanced required it to find evidence of harm before ordering divestiture." [61]

The court said (1) that the Commission "reasonably could have concluded . . . that a compelling factual showing [of harm from cross-ownership] was unlikely to be made;" [62] (2) that "the record no more establishes that cross-ownership serves the public interest than injures it;" [63] (3) that "it would have been rational for [the Commission] to conclude that divestiture was generally called for;" [64] and (4) that a policy requiring divestiture across the board would find support in the Communications Act, the First Amendment, and the Commission's long-standing policy of promoting diversity.[65]

Having found that a rule requiring across-the-board divestiture would have been "rational" and supportable, the court then concluded that a rule establishing a presumption of divestiture was "compelled." It held that the Commission had committed reversible error in not requiring breakup of all

[58] *Id.* at 956–66 (App. 394–430).
[59] *Id.* at 963 (App. 417).
[60] *Id.* at 956–57, 961 (App. 395–96, 411–13).
[61] *Id.* at 962 (App. 415–16).
[62] *Id.* at 961 (App. 412).
[63] *Id.* at 962 (App. 413).
[64] *Id.* at 962 (App. 414).
[65] *Id.* at 962–63 (App. 416–18).

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cross-ownerships except those "where the evidence clearly discloses that cross-ownership is in the public interest." [66] The court also held that the requirement of divestiture in communities with effective local monopolies was arbitrary and capricious because it believed that the line the Commission had drawn was not rational. In order that "everyone would be consistently treated," the court directed the Commission on remand to adopt a rule, subject to waiver only in exceptional circumstances, requiring across-the-board divestiture.[67]

SUMMARY OF ARGUMENT

The Commission initiated the subject rule making proceeding in part to determine whether, notwithstanding the possible disruption in the provision of broadcast service which would result, it might be in the public interest to order across-the-board divestiture of existing co-located newspaper broadcast combinations. The record did not support this initial proposal, however. There was no indication that such combinations exercised undue influence, either economically or in the marketplace of ideas, nor was there evidence of a pattern of abuses arising out of cross-ownership. In fact, it appeared that the number of combinations had been declining steadily for two decades, and that most remaining commonly owned facilities were operated separately. Accordingly, the Commission concluded that the need for across-the-board divestiture had not been shown.

The Commission, which did order a limited amount of divestiture, might still have ordered broader divestiture in the hope of increasing diversity of expression; however, absent a showing of actual need, it determined that the possible benefits of such drastic action were outweighed by certain consequences which would adversely affect the provision of the best practicable service to the public. Mass divestiture would have caused breaks in the continuity of service upon which listeners and viewers had come to rely, might also have resulted in a reduction of local ownership and a decline in available working cap-

[66] *Id.* at 966 (App. 431).

[67] *Id.* at 966 (App. 429–30); Order granting partial stay of mandate, 555 F. 2d at 969–70 (App. 443).

ital, and would have been unfair to licensees who had served the public. For all these reasons, the Commission decided to "grandfather" most existing newspaper-broadcast combinations.

This decision was consistent with the Commission's previous actions in adopting various rules in furtherance of diversification of ownership, where divestiture has always been the exception rather than the rule. The Commission has also grandfathered when it has changed policy in other areas, such as cable regulation, and a similar approach has long been followed by other agencies and by the Congress. Moreover, grandfathering has been consistently approved by the courts, including this Court, as an appropriate response to the need to regulate for the future while at the same time satisfying the dictates of fairness.

Nevertheless, there were a few cases in which divestiture was warranted. In sixteen smaller markets, where the Commission found *prima facie* evidence that cross-owners had effective monopolies over local media, it required that (absent waiver) these combinations be broken up by 1980. The standard for determining if there was a monopoly was whether the only daily newspaper in a community was commonly owned with the only television station (or, if the community had no television station, the only radio station) placing a city grade signal over that community. The Commission determined that in such situations, where there was not even a single independently owned local media source to offer a significant juxtaposition of views and economic competition, no remedy other than divestiture was sufficient. This determination, too, was consistent with applicable judicial precedent.

* * * * *

The respective roles of agencies and reviewing courts have been clearly defined. It is the agency's function to weigh the relevant public interest factors involved in a decision, and the court may not substitute its judgment for that of the agency or dictate the result the agency must reach on remand. Here, however, the court did just that when it reversed the Commission for failing to order across-the-board divestiture and re-

manded the record "for adoption of a rule" compelling such divestiture. Moreover, the court took this action notwithstanding its awareness that divestiture had to be rationally based and its express recognition that the record was inconclusive so that the Commission necessarily had to rely primarily on policy considerations. The court claimed that the agency should have given controlling weight to a presumption that cross-owned stations do not serve the public interest, instead of relying on what the court deemed to be lesser policies unsupported by the record.

In spite of the court's assertions, however, there is no compelling presumption that cross-owned stations do not serve the public interest. To the contrary, the Commission, in seeking to insure the best practicable service to the public, has always taken into account, both in rule making and in adjudication, not only the hope for an increase in diversity, but also the need for continuity of service repeatedly found to have been in the public interest. Thus, the Commission did not rely here on "lesser policies", but on considerations which it has always treated as being of primary importance.

The court below was also mistaken in its contention that the Commission's decision lacked support in the record. Moreover, it is settled that an agency, in formulating rules, may look beyond the particular record of a proceeding in order to draw upon its expertise. Indeed, this is particularly appropriate where, as here, an agency is attempting to provide for the future, and the decision must rest primarily on policy rather than factual considerations.

The court also vacated the Commission's rules requiring divestiture in sixteen monopoly markets, arguing that although these markets admittedly contained fewer voices, they might in fact have no less diversity. But the assumption that there is a correlation between additional voices and greater diversity is the foundation of the Commission's multiple ownership policy and has been recognized as such by the courts. Indeed, in this proceeding the court below (1) upheld the Commission's prospective rules and (2) directed the agency to require across-the-board divestiture, because of this very assumption, as evidenced

by the court's recognition in both situations that there was no guarantee that these measures would increase diversity. These contradictory approaches make it clear that the court was not really testing the rationality of the Commission's decision, but was simply disagreeing with the particular policy balance struck by the agency.

In sum, the Commission acted reasonably in determining the extent to which a change in its long established policy concerning newspaper-broadcast cross-ownership was appropriate, and the decision of the court below ordering a more extensive change in this policy should be reversed.

ARGUMENT

I. THE DECISION OF THE COMMISSION NOT TO REQUIRE ACROSS-THE-BOARD DIVESTITURE OF EXISTING CO-LOCATED NEWSPAPER-BROADCAST COMBINATIONS WAS LAWFUL, RATIONAL, AND BASED ON A CONSIDERATION OF ALL THE RELEVANT PUBLIC INTEREST FACTORS

> Divestiture has a substantial impact, and should be required only when we can determine that it is required by the public interest. We agree that it is not necessary to have proof of abuses before we can act, and we recognize that trading of stations would tend to lessen concern based on financial losses or investment uncertainty. However, we do not think that these considerations are a substitute for the requirement of a stronger showing than we have of the need for such a severe remedy on a broader basis. Even if some disruption occurs, we have acted to divest where competition and diversity are absent. Extending this to apply to all newspaper-television combinations, regardless of competition is not warranted on the record before us and would cause serious public injury. . . . We have drawn a line that is based on competition as well as diversity of voices and our experience suggests that there is neither need nor wisdom in going beyond it. 50 FCC 2d at 1080, n. 29. (App. 200-202).

This quotation, from the Commission's *Second Report and Order*, summarizes the Commission's approach to the problem of divestiture in the context of newspaper-broadcast cross-

ownership. In the following discussion, we will show that the approach was rational, and that the court below failed to afford the Commission the discretion to which it is lawfully entitled in formulating broadcast policy.

A. THERE WAS NO RECORD OF HARM FROM EXISTING CROSS-OWNERSHIP

The Commission initiated the subject rule making proceeding in part to test the hypothesis that newspaper-broadcast cross-ownership presented a pervasive danger of insufficient diversity of viewpoints in the major mass media. By the close of the record in this nearly five-year long proceeding, however, it was clear that the initial hypothesis had not been substantiated by showings of actual harm. Although a great many comments and studies had been submitted, there was no showing that existing newspaper-broadcast combinations exercised undue influence either economically or in the marketplace of ideas. To the contrary, media concentration was declining, not growing. For more than 20 years, the number of broadcast stations co-owned and co-located with newspapers had been decreasing, both in absolute numbers and as a percentage of the total number of stations. The continuation of this trend was assured by the Commission's new rules, which prohibit not only the establishment of new cross-ownerships but also the transfer of any existing combination intact to a new owner. 50 F.C.C. 2d at 1080 n.29 (App. 200–202).

Nor was there any showing of a pattern of abuses arising out of cross-ownership. There was virtually no evidence whatever of abuse in the record.[68] Nor was any pattern of abuse suggested by extra-record submissions filed during the course of the rule making proceeding against individual cross-owners, including both petitions to deny and competing applications. The few allegations of abuse of which the Commission was aware, on or off the record, were so scattered, unspecific, and tenuous in their relationship to the fact of cross-ownership, that they provided no basis for a sweeping divestiture rule. Having now examined all such allegations filed in individual cases since the

[68] See 50 FCC 2d at 1072, 1085, 1089 (App. 186, 211, 219).

start of this proceeding in 1970, the Commission has found only one instance in which allegations of abuse against newspaper cross-owners proved sufficient to warrant a hearing.[69]

Far from finding indications that cross-owners tend to misuse their common ownership, the record indicated that cross-ownership presented a lesser threat to diversity than had been supposed. The Commission noted that it might have ordered broader divestiture if there had been substantial evidence that cross-owned media were being operated "monolithically" or were "speaking with one voice." 50 F.C.C. 2d at 1089 (App. 219). But the record indicated that most commonly owned newspapers and broadcast stations were operated seperately. The Commission concluded that, while such separate operation could not be equated with seperate ownership, it was nonetheless a factor to be considered in weighing the need for greater diversity. *Id.*

Despite the lack of evidence of harm, the Commission did determine that divestiture was warranted in a few cases where there was a *prima facie* showing of "effective monopoly" of major local media. *See* discussion at pp. 29–31, *infra*. Except in those situations, however, the Commission reasonably determined that there had been no showing of harm to the public interest requiring widespread divestiture of newspaper-broadcast combinations. The Commission recognized that it had the discretion to order greater divestiture in the hope of increasing diversity of expression in the media. 50 F.C.C. 2d at 1080 n.29 (App. 200–202). But absent a showing of need, it determined that the adverse consequences of such drastic action outweighed the possible benefit.

B. THERE WERE COUNTERVAILING FACTORS AFFECTING SERVICE TO THE PUBLIC WHICH WEIGHED AGAINST WIDESPREAD DIVESTITURE

1. Loss of continuity

As noted in the counterstatement (p. 5, *supra*), one of the Commission's "primary objectives" is the provision of the "best practicable service to the public." *Policy Statement on*

[69] *See WGAL Television, Inc.*, 62 FCC 2d 527 (1976).

Comparative Broadcast Hearings, *supra*, 1 F.C.C. 2d at 394; *Federal Communications Commission* v. *Sanders Bros. Radio Station*, *supra*, 309 U.S. at 475. The Commission has long taken the position that a policy of continuity furthers this objective, and thereby serves the public interest, by enabling licensees to establish permanent community ties and become familiar with the needs of their service areas. In fact, the Commission expects that licensees intend to continue in broadcasting in order to establish traditions of service and develop programming. Thus, it has formulated a rule against trafficking—the acquisition and sale of licenses to realize a quick profit—in order to protect the public from a break in the continuity of service it becomes accustomed to expect. 47 C.F.R. § 1.597. A broadcaster who engages in such conduct may be disqualified from later returning to the broadcast business. *Crowder* v. *Federal Communications Commission*, 399 F. 2d 569, 572 and n. 22 (D.C. Cir.), *cert. denied*, 393 U.S. 962 (1968)."[70]

These considerations formed the background for the agency's conclusion in this proceeding that "stability and continuity of ownership do serve important public purposes." 50 F.C.C. 2d at 1078 (App. 197). Newspaper-owned stations had established traditions of service, even before there was any assurance of profit, and had maintained these traditions, in some cases for decades. In fact, a careful study by the Commission's staff found that newspaper-owned stations even showed some superiority to other stations in several categories of local programming. 50 F.C.C. 2d at 1078 n. 26, 1096 (App. 198, 234). Divestiture introduced the danger of disrupting this proven, superior service—to the detriment of the public interest.

The concern for preserving continuity of service and avoiding disruption has long been an important factor in fashioning the Commission's multiple ownership rules. Generally, there-

[70] On the other hand, the Commission has not thought it wise to "lock in" for all time those who do not wish to continue in broadcasting. Accordingly, it permits licenses to be transferred or assigned after three years. Again, this is in furtherance of the goal of best practicable service to the public. The Commission believes that such service is not likely to be had from unwilling licensees.

fore, these rules have only applied prospectively, with little or no divestiture required. For example, the Commission's chain broadcasting regulations, promulgated in 1941, did not require radio networks to give up all their owned and operated stations. The Commission stated that it might have decided differently if this question had arisen before such ownerships had actually come into being. Under the circumstances, however, it ordered divestiture only where two AM stations were licensed to the same network in the same area, or where the available facilities were so few that the network had little if any competition. *Report on Chain Broadcasting* (Order No. 37, Docket No. 5060) (1941). In affirming the chain broadcasting rules, this Court expressly noted the Commission's reluctance to order more extensive divestiture."[71]

Similarly, when, in 1953, the Commission limited to seven, seven and five, respectively, the number of AM, FM and VHF-TV stations which could be under common control, it deliberately set these limits at a level that would not require extensive divestiture because it believed this would be "unduly disruptive." *Multiple Ownership Rules* (Docket No. 8967), *supra*, 18 FCC at 292. In the few instances where the limits were exceeded, divestiture was dealt with case by case. *Id.* at 295. When the 1953 ownership rules were judicially challenged, this Court upheld the Commission's authority to place limits on the number of commonly owned stations in the same service. *United States* v. *Storer Broadcasting Co.*, *supra*, 351 U.S. at 203. On remand to the District of Columbia Circuit, the specific limits established by the Commission were sustained on the ground that they were based on the Commission's experience, "coupled with a design to avoid undue disruption of existing station ownership." *Storer Broadcasting Co.* v. *United States*, *supra*, 240 F. 2d. at 56 & n. 3."[72]

[71] *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 206-207 (1943).

[72] The Commission subsequently limited the total number of VHF and UHF television stations which could be under common ownership to seven. The limit of 5 VHF stations remained in force.

When the Commission first adopted rules which prohibited a single party from owning two or more AM stations in the same area, *Multiple Ownership of Standard Broadcast Stations*, *supra*, 8 Fed. Reg. 16065 (1943), approximately 20 existing combinations were required to divest. *FCC Eleventh Annual Report* (1946), p. 12. However, in 1964, when the Commission amended its rules to reflect stricter and more precise standards for determining prohibited overlaps in AM, FM and TV, no divestiture was required of the numerous existing combinations. *Multiple Ownership Rules* (Docket No. 14711), *supra*, 45 F.C.C. 1476. Nor did the Commission require divestiture when it adopted rules prohibiting common ownership of television and radio stations in the same market. *Multiple Ownership Rules* (Docket No. 18110), 22 F.C.C. 2d 306 (1970), *modified on other grounds*, 28 F.C.C. 2d 662 (1971).[13]

2. Reduced local ownership

Widespread divestiture also raised the possibility of reduced local ownership. At present, some 75% of all newspaper-broadcast combinations are locally owned.[14] It seemed probable to the Commission that if across-the-board divestiture were ordered, many sales would be to non-local interests, particularly if there were widespread "swapping" among those ordered to divest. This net loss of local owners, especially in view of their characteristic traditions of service to the community, was another factor which contributed to the Commission's ultimate decision, even though this consideration would not apply in every case.

3. Economic dislocation

Across-the-board divestiture also introduced certain economic considerations, arising from the much increased value of broadcast stations as well as the higher interest rates prevail-

[13] This decision not to require divestiture of existing radio-TV combinations was reaffirmed in the order now before the court. 50 FCC 2d at 1055 (App. 152). However, no party sought review of this aspect of the order.

[14] 555 F. 2d at 963–964 (App. 420–421).

ing in today's market. On the basis of the evidence submitted, the Commission concluded that the demand for equity capital to purchase broadcast properties might be so great as to lead to a reduction of the working capital which would otherwise be available for programming, including news and public affairs programming. The possibility of such diminution of service was relevant to the making of a public interest determination, and undercut any benefits associated with a mere hoped for gain in diversity. 50 F.C.C. 2d at 1068, 1078 (App. 178, 197). While the Commission did not suggest that this would in itself outweigh the benefits possibly to be derived from divestiture, it was one of several countervailing factors which could rationally be considered.

4. Unfairness to existing licensees

The Commission was also concerned with giving fair treatment to existing licensees whose broadcast service had consistently served the public interest. The Commission knew from its experience, and the record confirmed, that newspaper cross-owners typically had long-standing commitments to broadcasting in their communities.[15] In some cases, the commitment was even undertaken with the Commission's affirmative encouragement. Uprooting these owners from their chosen communities would work an inherent hardship, quite apart from any question of financial gain or loss. As the D.C. Circuit Court of Appeals has elsewhere recognized, existing licensees who have given good service have "legitimate renewal expectancies" which, at the very least, should not be destroyed without good cause. *Greater Boston Telecasting Corp.* v. *Federal Communications Commission*, 444 F. 2d 841, 854 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Except in a very few cases where a newspaper-owned licensee was operating in a community where competition and diversity were absent the Commission did not find good cause in this proceeding to uproot existing licensees.

[15] See p. 24, *supra*.

C. GRANDFATHERING ROUTINELY ACCOMPANIES THE ADOPTION OF NEW POLICIES

The grandfathering of most existing newspaper-broadcast combinations, which was supported in this instance by the foregoing considerations, is a routine legislative and administrative practice, often followed without extensive discussion. The Commission has usually taken this approach in adopting its multiple ownership rules, ordering divestiture on only a few occasions. See discussion at pp. 24–26, *supra*. And there are several other policy areas where the Commission has applied its rules solely on a prospective basis. *See, e.g., FM Broadcast Rules,* 40 F.C.C. 720, 725–726 (1962) (existing "supermaximum" FM stations grandfathered); *Daytime Skywave Transmission Rules,* 18 Pike & Fischer Rad. Reg. 1845 (1959) (existing station interference grandfathered); *CATV Rules,* 2 F.C.C. 2d 725, 785 (1966) and 36 F.C.C. 2d 143 (1972) (existing "distant signals" on CATV systems grandfathered); *Telephone Terminal Equipment Rules,* 59 F.C.C. 2d 83 (1976) (existing types of terminal equipment grandfathered under registration program).

Grandfathering is also a customary procedure at other administrative agencies. At the Internal Revenue Service, for instance, new rules adverse to taxpayers are generally applied only prospectively. *Lesavoy Foundation* v. *Comm'r,* 238 F. 2d 589, 591 (3d Cir. 1956). The Food and Drug Administration has gone so far as to codify grandfathering as its general practice "unless . . . substantial public interest considerations preclude [it]." 21 C.F.R. § 10.90(b)(6). The Environmental Protection Agency has frequently refrained from applying its new and more stringent standards to existing facilities. *See, e.g., South Terminal Corp.* v. *Environmental Protection Agency,* 504 F. 2d 646, 674 (1st Cir. 1974) (parking garages); *Kennecott Copper Corp.* v. *Train,* 526 F. 2d 1149, 1152 and n.16 (9th Cir. 1975), *cert. denied,* 425 U.S. 935 (1976) (smokestacks). So has the Consumer Product Safety Commission. 16 C.F.R. §§ 1201.1(b), 1207.2 (architectural glass; swimming pool slides).

Indeed, Congress has often grandfathered on an industry-wide basis when a new overall regulatory approach is being adopted. *See, e.g.,* Civil Aeronautics Act of 1938, 52 Stat. 973, 987–988 (existing air carriers entitled to certificates of public convenience and necessity absent proof that their prior service was inadequate); Motor Carrier Act of 1935, § 206, 49 Stat. 543 (existing motor carriers entitled to certificates if in "bona fide operation" as of a certain date).

The practice of grandfathering has been approved by this Court. In *United States* v. *Maher,* 307 U.S. 148, 153 (1939), it was stated that this practice permits decision makers to respond "to the felt need for regulating . . . through familiar administrative devices, while at the same time . . . satisf[ying] the dictates of fairness by affording sanction for enterprises theretofore established." And in *Securities and Exchange Commission* v. *Chenery Corp.,* 332 U.S. 194, 202 (1947), this Court indicated that it was desirable for agencies to develop policies in furtherance of a statutory mandate through the "quasi-legislative promulgation of rules to be applied in the future." [76]

D. DIVESTITURE WAS PROPERLY REQUIRED IN A LIMITED NUMBER OF CASES WHERE THERE WAS NO OTHER INDEPENDENTLY OWNED SIGNIFICANT LOCAL MEDIA SOURCE

As discussed above, the record compiled in this proceeding did not support the Commission's hypothesis that extensive divestiture of co-located newspaper-broadcast combinations was either necessary or desirable. However, in a few cases, where the Commission found *prima facie* evidence that a cross-owner had an "effective monopoly" of local media, 50 F.C.C. 2d at 1081 (App. 203), it required that cross-owner to sell one of its media interests by 1980 or (absent waiver) face non-renewal of its broadcast license.

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[76] The District of Columbia Circuit has also approved the principle of grandfathering in a case involving this Commission. *Buckeye Cablevision, Inc.* v. *Federal Communications Commission,* 387 F. 2d 220, 227–228 (1967), citing *United States* v. *Maher, supra.*

The Commission examined all known instances where communities were served by newspaper-broadcast combinations in order to determine whether there were some communities where there was no diversification and where, therefore, the common owner was likely to have a monopoly in the marketplace of ideas as well as economically. The key point was whether the local listeners or viewers could turn to at least one other competing station which could be expected to cover local news and provide programming on local needs and interests, or to one other daily newspaper.

Since the focus was on whether any other full-fledged choice existed, some standards had to be selected for determining whether other broadcast services available in a community were truly competitive so as to prevent a common owner from having a local monopoly. The Commission concluded that, generally, only a city grade signal—the most intense and proximate under its rules—would be adequate for making this determination.[77] Accordingly, if community X had a commonly owned radio station and sole daily newspaper, and no other city grade radio signal encompassed that community, the license for the radio station would not be renewed unless the newspaper were sold by 1980.[78] Similarly, if there were a lone daily newspaper co-owned and co-located with a television station, a sale by 1980 would be required unless a city grade television signal encompassed the community in which the daily news-

[77] This was not an arbitrary choice. The Commission has for many years required that a licensee place a city grade signal (also known as a "principal community contour") over the entire community that it is licensed to serve. 47 C.F.R. §§ 73.188, 73.315, 73.685. Although it is not possible to predict precisely the quality of a broadcast signal at any time over a particular location, the city grade standard offers the best possible assurance that a signal will be provided which is of sufficient intensity to render consistent and satisfactory service to the listening or viewing public. *See, e.g., Wheeling Antenna Co.* v. *United States*, 391 F. 2d 179, 181 (4th Cir. 1968).

[78] The rules, of course, permitted sale of the radio station; and if more than one broadcast facility were co-owned with the newspaper, only one of the stations would have to be sold. The one exception to the rules was where there was also a separately owned television station licensed to the community in question. In that case, no sale was required. 50 FCC 2d at 1084 (App. 209).

paper was published.[79] In all, sixteen combinations in as many communities met these criteria for divestiture.

As a result of the Commission's approach, the divestiture which was required involved concentrated ownership in the smaller, rather than the larger, more competitive markets. The Commission explained that it was in these smaller markets, where there were not even two signals to provide "an effective juxtaposing of views on local issues," 50 F.C.C. 2d at 1083 (App. 207), that no remedy other than divestiture was sufficient.

This divestiture standard was consistent with the observation of this Court that the statutory public interest standard might not be met when "the publisher of the sole newspaper in an area applie[d] for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communication." *United States* v. *Radio Corp. of America, supra,* 358 U.S. at 351–352. The District of Columbia Circuit has also stated on at least two occasions that the need for diversity and the dangers of concentration of control are greater in smaller than in larger communities. *Greater Boston Television Corporation* v. *Federal Communications Commission, supra,* 444 F. 2d at 859–860; *Massachusetts Bay Telecasters* v. *Federal Communications Commission,* 261 F. 2d 55, 64–65 n. 24 (1958).

II. THE DECISION OF THE COURT OF APPEALS TO REQUIRE DIVESTITURE OF ALL EXISTING CO-LOCATED NEWSPAPER-BROADCAST COMBINATIONS WAS AN IMPROPER SUBSTITUTION OF THE COURT'S JUDGMENT FOR THAT OF THE AGENCY

The respective roles of administrative agencies and reviewing courts have been clearly and sharply defined by this Court. The

[79] The presence of a radio station in the same community would not, absent a waiver, exempt the newspaper-television monopoly owner from the mandatory sale requirement. The Commission stated that if the only television station casting a city grade signal over a community were commonly owned with that community's only daily newspaper, it would be unreasonable to assume that a radio station, even one located in the same community, could compete effectively against such a combination. The Commission noted that newspapers and television are the public's most relied upon sources of information.

agency's role is expansive; it is charged with assessing the relevant factual and policy considerations, "both existing and foreseeable," *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968), and with exercising the "power to weigh the competing interests and arrive at a balance that is deemed 'the public convenience and necessity.'" *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 293 (1974), citing *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 535–536 (1946). Put another way, it is the agency's function "not only to appraise the facts and draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies." *United States* v. *Detroit and Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945).

By contrast, in reviewing agency action, the court's only function is to determine whether the agency's decision is rational and based on consideration of the relevant factors. *Citizens To Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971); *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, *supra*, 419 U.S. at 285. "The court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors." *Permian Basin Area Rate Cases*, *supra*, 390 U.S. at 792. It is settled that courts must affirm decisions with which they disagree so long as this test is met. *Ethyl Corp.* v. *Environmental Protection Agency*, 541 F. 2d 1, 33–37 (D.C. Cir. 1976), citing *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, *supra*, 419 U.S. at 290; *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972). That a court "might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem [of deciding whether the public interest will be served] to the latter." *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946). And when an agency's decision is based primarily on

policy considerations, it is even more to be respected; in fact, it is "entitled to the greatest amount of weight by appellate courts." *Securities and Exchange Commission* v. *Chenery Corp.*, *supra*, 332 U.S. at 209. In short, "[t]he court is not empowered to substitute its judgment for that of the agency." *Citizens To Preserve Overton Park, Inc.* v. *Volpe*, *supra*, 401 U.S. at 416.

In reviewing the Commission's order as it pertained to existing newspaper-broadcast combinations, the court below first stated that since "divestiture contains elements common to suspect retroactive legislation," the authority to invoke this remedy had to be reasonably exercised. 555 F. 2d at 955 (App. 390). The court then admitted that the record was "essentially inconclusive," 555 F. 2d at 962 (App. 414), and that, in reaching its decision, "the Commission necessarily had to rely primarily on policy, not factual considerations." *Id.* at 957 (App. 396). Moreover, the court was unable to deny that the Commission had followed a classic "balancing test" approach in evaluating these considerations, and it could not point to a single relevant consideration which the Commission had failed to take into account. Notwithstanding all this, and despite paying lip service to the concept of judicial restraint, *id.* at 956 (App. 394), the court reversed the Commission for declining to order across-the-board divestiture. The court accomplished this result, first, by professing to discover a "presumption" that "cross-owned stations do not serve the public interest," *id.* at 963 (App. 417), and, second, by insisting that "the Commission could not rationally conclude" that what the court described as "lesser policies, lacking support in the record," were sufficient to overcome this presumption. *Id.* at 965 (App. 427).

A. THERE IS NO PRESUMPTION THAT CROSS-OWNED STATIONS DO NOT SERVE THE PUBLIC INTEREST

As indicated *supra*, the court below compelled the Commission to order across-the-board divestiture largely because the agency had not given "controlling weight," 555 F. 2d 967 at 969

(App. 443) to the "presumption" that "cross-owned stations do not serve the public interest." 555 F. 2d at 963 (App. 417). The court's argument fails for the simplest of all possible reasons. There is no such presumption.

The court found three bases of "support" for its presumption.[50] The first was Section 303(g) of the Communications Act, 47 U.S.C. § 303(g), which empowers the Commission to "encourage the larger and more effective use of radio in the public interest." 555 F. 2d at 962–963 (App. 417). The Commission also found support for its multiple ownership rules in Section 303. 50 F.C.C. 2d at 1089 (App. 220). The Commission has never interpreted Section 303, however, to mean that "cross-owned stations do not serve the public interest," and the court cited no case, nor anything in the legislative history of the Act, which indicated that Section 303 mandated such an interpretation. The court therefore failed to observe the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381 (1969).

The court next contended that "[t]he policies of the First Amendment also support this presumption." 555 F. 2d at 963 (App. 417). The Commission, of course, has specifically stated that its multiple ownership policy is derived in part from First Amendment sources. 50 FCC 2d at 1048 (App. 139). But the Commission has never invoked the First Amendment in support of the proposition that cross-owned stations do not serve the public interest. Nor has Congress done so, and in evaluating First Amendment claims, courts "must afford great weight to the decisions of Congress and the experience of the Commission." *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94, 102 (1973). Moreover, where,

[50] The court never explained how the presumption made the leap from being "supported", 555 F. 2d at 962–963 (App. 417), to being "compelled", *id.* at 966 (App. 431).

as here, there are "doubts as to the wisdom of mandating, rather than merely allowing" diversity of expression, "courts should [not] impose an inflexible response as a matter of constitutional law." *Public Interest Research Group* v. *Federal Communications Commission*, 522 F. 2d 1060, 1067 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976) (fairness doctrine).

Lastly, the court found support for its presumption in "the Commission's longstanding policy . . . that diversification is of central importance." 555 F. 2d at 963 (App. 418). The Commission does have such a policy and has taken it into account both in licensing by adjudication and in adopting its multiple ownership rules. But it is not the Commission's view, as the court expressly recognized, 555 F. 2d at 963 (App. 418), that literally "nothing can be more important" than the maximum possible diversity. Rather, as demonstrated at pp. 24–26 *supra*, the Commission has always taken into account other considerations as well, particularly the need to insure continuity of existing service to avoid the disruption which might attend divestiture. Accordingly, the Commission, in rule making, has ordered relatively little divestiture of existing multiple owners [51]—just as, in adjudicating, it has repeatedly renewed

[51] This has long been recognized. In commenting on the multiple ownership rules as they existed in 1957, Dean Roscoe L. Barrow observed that: "Carried to their logical conclusion, the local ownership and maximum diversity policies would result in a 'one to a customer' limit to station ownership. However, the Commission has balanced these doctrines with that of favoring an applicant having a sound record of past performance, and with other doctrines. This equipoise of doctrines has resulted in the current multiple ownership rule under which a maximum of seven television stations may be licensed to the same interest." H.R. Rep. No. 1297, 35th Cong., 2d Sess. 558 (1957).

See also *Citizens Communications Center* v. *Federal Communications Commission*, 447 F. 2d 1201, 1212–14 nn. 33 & 36 (D.C. Cir. 1971), where, in another context, the court said that diversification was "a factor properly to be weighed and balanced with other important factors." *Cf. Fidelity Television, Inc.* v. *Federal Communications Commission*, 515 F. 2d 684 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975).

the licenses of multiple owners found to be operating in the public interest. Contrary to the assertion of the court below, therefore, consistency would *not* call for ordering divestiture absent a showing of greater public harm. 555 F. 2d at 963 (App. 418). The consistent approach was exactly that which the Commission chose.

Indeed, if the court below were right, and the Commission were compelled to act on the basis of a presumption that cross-owned stations do not serve the public interest, then the Commission has violated the Constitution, its enabling statute, or its own guiding principles every time it has renewed the license of a cross-owned station, or adopted a multiple ownership rule calling for less than total diversification. Such a proposition, of course, is absurd. Consistent and long-standing agency, judicial and Congressional actions belie such an interpretation.

And this is so, ultimately, because the presumption rests on an obvious fallacy. The court took as its propositions (1) that diversified ownership is in the public interest, and (2) that insofar as cross-ownership is permitted, it results in less diversity, and concluded therefrom that (3) cross-ownership is not in the public interest. But even if these propositions were correct (and the Commission did not find that the second proposition was necessarily correct), the court's syllogism is illogical, for "public policy is not like a single track where only one train can run at a time." *National Association of Independent Television Producers & Distributors* v. *Federal Communications Commission*, 516 F. 2d 526, 542 (2d Cir. 1975). Specifically, the court forgot that it is in the public interest not only to seek diversity, but also to insure the best practicable service to the listening and viewing audience—which latter objective may, in many cases, be achieved by permitting existing broadcasters, even cross-owners, to continue as licensees. Thus, the Commission was correct when it stated that its problem in this proceeding was deciding "how much diversity to seek in terms of

providing the best practicable service to the American public." 50 FCC 2d at 1074. (App. 189–190).[82]

B. THERE IS NO MERIT TO THE COURT'S ATTACK ON THE COMPETING VALUES ON WHICH THE COMMISSION RELIED

The court below also held that the Commission's decision not to require complete divestiture could not be "justified" by the "competing policies it offered," since these were "lesser policies, lacking support in the record." 555 F. 2d at 965 (App. 426–27). However, it was not the court's function, but the Commission's, to weigh the various policy considerations and determine which should control. See discussion at pp. 35–36, *supra*. Since the Commission did this, and adequately explained its conclusions, the court below should have had no reason but to affirm—particularly in light of its previous statement that it did not intend to "imping[e] at all upon the Commission's substantive discretion in weighing factors and granting licenses." *Citizens Communications Center* v. *Federal Communications Center, supra*, 447 F. 2d at 1213 n. 33. But instead, the court rebalanced the scales and assigned a lower value to the factors relied upon by the Commission, in order to reach the result which it, the court, preferred. This intrusion into the administrative decision making process should not be condoned by this Court.

Not only was the court's rebalancing impermissible, but its reasoning was faulty. Its major argument was that continuity,

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[82] The court also faulted the Commission for "never explain[ing] why it had abandoned the presumption suggested in the notice of proposed rulemaking." 555 F. 2d at 963 (App. 419). But there was no such "suggestion" in the *Further Notice*, which, while it did contemplate requiring across-the-board divestiture, 22 FCC 2d at 346 (App. 115–17), also expressed substantial concern for the disruption which might accompany such a hardship. *Id.* at 348 (App. 119). In any event, the *Further Notice* did not limit the Commission's options in formulating rules once comments were submitted. *Cf. Owensboro on the Air, Inc.* v. *United States*, 262 F. 2d 702, 708 (D.C. Cir. 1958); *Logansport Broadcasting Corp.* v. *United States*, 210 F. 2d 24, 28 (D.C. Cir. 1954). Indeed, the Administrative Procedure Act requires only that an agency explain the basis and purpose of rules actually adopted. 5 U.S.C. § 553.

local ownership, etc. had to be lesser concerns because they had not prevented the Commission from approving assignment and transfer applications. 555 F. 2d at 963–965 (App. 417–427). But if the Commission were to force broadcasters to stay in business against their will, the service provided under such circumstances, albeit continuous, might well not be worth preserving. Thus, the fact that the Commission approves assignments and transfers in no way undermines its decision to place a premium on the continuation of proven past service by those licensees who wish to remain in business.[83]

The court below was also mistaken when it asserted that the Commission policies militating against divestiture lacked "support in the record." 555 F. 2d at 965 (App. 427).[84] Moreover, its view appears to be that an administrative agency cannot rely upon general policies developed on the basis of its experience in administering its statute unless they are reestablished as sound in the immediate proceeding. This is contrary

[83] The court, in its attempt to promote diversity, tried to leave room for the continuing importance of the factor of minimizing disruption by asserting that "the new owners will become the beneficiaries of any unofficial policy of continuity" 555 F. 2d at 964 (App. 422). The Commission might have adopted what could be described as a one-time upheaval approach, but that did not afford the court the authority to impose a balance more nearly to its liking. *Permian Basin Area Rate Cases, supra.* Similarly, although local ownership without any participation in the operation of a station is given no credit in a comparative proceeding, it was not unreasonable for the Commission in a policy making context to take account of the intangible benefits of local ownership, a factor of even some importance in a comparative proceeding, 1 FCC 2d 393, 395–396. The court, however, preferred to speculate that local entrepreneurs would find broadcasting an attractive investment, and that, therefore, there would be no loss of local ownership. 555 F. 2d at 964 (App. 421).

[84] For example, many parties urged the Commission to consider the public interest benefits derived from the long meritorious service of newspaper owned stations. 50 FCC 2d at 1064, 1065, 1066–67, 1071, 1078 (App. 169–170, 171, 174–175, 183–184, 197–198). Similarly, there was record support for the Commission's conclusion that divestiture might have an adverse economic impact ultimately affecting the quality of program service. 50 FCC 2d at 1068 (App. 177–178).

to settled legal principles recognizing the advantage of encouraging an agency in rulemaking to "look beyond the particular hearing record since it otherwise would be unable to draw upon its expertise." *Pacific Coast European Conference* v. *United States,* 350 F. 2d 197, 205 (9th Cir. 1965). *Cf. Securities and Exchange Commission* v. *Chenery Corp., supra,* 332 U.S. at 209. This ability is particularly useful where, as here, an agency is endeavoring to provide for the future: "[A] forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency." *Federal Power Commission* v. *Transcontinental Gas Corp.,* 365 U.S. 1, 29 (1961).

C. THERE IS NO IRRATIONALITY IN THE COMMISSION'S DIVESTITURE RULE

The court below, in addition to concluding that the Commission must adopt rules requiring all existing combinations to divest, also vacated the rules which the Commission had adopted requiring divestiture in sixteen monopoly markets. The court's stated reasons for taking the latter action are further instances of its unlawful substitution of judgment for that of the agency.

The court first took the view that "the record d[id] not support the conclusion that divestiture would be more harmful in the grandfathered markets than in the 16 affected markets." 555 F. 2d at 966 (App. 429). But the Commission reached no such conclusion; to the contrary, it treated harm from divestiture as a constant in both classes of cases. Its decision to require the break up of monopoly cross-ownerships rested on its conclusion that in these cases, and these only, greater harm to the public would result if divestiture were *not* ordered. Thus, here too, as in its treatment of non-monopoly situations, the Commission followed the classic approach of balancing the relevant public interest considerations. The court below should not have rebalanced the scales to suit its own predilections. *Permian Basin Area Rate Cases, supra; Citizens To Preserve Overton Park, Inc.* v. *Volpe, supra; Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., supra.*

In finding the Commission's divestiture rule irrational, the court below also asserted that "[a]lthough the affected markets contain fewer voices, the amount of diversity in communities with additional independent voices may in fact be no greater." 555 F. 2d at 966 (App. 429). This statement, of course, is true, since additional voices do not *necessarily* increase diversity. But the *assumption* that there is a correlation between additional voices and diversity lies at the very heart of the Commission's multiple ownership policy, and the fact that the beneficial effects of this policy cannot be predicted with certainty has neither stopped the Commission from adopting rules nor, until now, prevented the courts from upholding them. *National Broadcasting Co.* v. *United States, supra; United States* v. *Storer, Broadcasting Co., supra.* "A statute is not invalid . . . because it may not succeed in bringing about the result it tends to produce." *Roschen* v. *Ward*, 279 U.S. 337, 339 (1929). This principle is equally applicable to an administrative rule.

Indeed, in this very proceeding, the court below upheld the Commission's prospective rules notwithstanding its express recognition that there was "no guarantee" that these rules would increase diversity either. 555 F. 2d at 950 (App. 373), quoting *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, 96 (1953) ("the possible benefits of competition do not lend themselves to detailed forecast"). And the lack of such a "guarantee" did not prevent the court from directing the Commission to enact rules ordering *all* existing combinations to divest. ("The gains in diversity . . . may be speculative, but . . .") 555 F. 2d at 965 (App. 426–427). The contradictions further highlight the court's usurpation of the Commission's policy making powers and make clear that the court simply disagreed with the particularized policy balance struck by the Commission.

The court's citation of *Melody Music* v. *Federal Communications Commission*, 345 F. 2d 730, 733 (D.C. Cir. 1965), is inapposite. That case held that the Commission could not justify disparate treatment of similarly situated applicants merely

by enumerating irrelevant factual differences between them. Here, the Commission adequately explained why the factual differences between the two groups of cross-owners warranted disparate treatment. Those required to divest enjoyed an effective monopoly of local media. Those not required to divest had no such monopoly. An additional local daily newspaper or comparable broadcast station in what would otherwise be a market with an effective local monopoly is both relevant and material. The existence of such an entity provides an inducement to competition economically as well as in the marketplace of ideas.

The court's final reason for vacating the Commission's divestiture rules was that limiting divestiture to small markets "squanders the opportunity" to act where divestiture "might do the most good," that is, "in the larger markets." 555 F. 2d at 966 (App. 430). This statement, in addition to being a patent substitution of judgment, *Citizens To Preserve Overton Park, Inc.* v. *Volpe, supra*, is in direct conflict with two prior opinions of the same court which upheld the Commission's view that it is the smaller rather than the larger markets which most likely suffer from a lack of diversity of views. *Greater Boston Television Corp.* v. *Federal Communications Commission, supra*, 444 F. 2d at 859–860; *Massachusetts Bay Telecasters* v. *Federal Communications Commission, supra*, 261 F. 2d at 64–65 n. 24. *Cf. Fidelity Television, Inc.* v. *Federal Communications Commission, supra*, 515 F. 2d at 701. And in any event, an administrative rule, like a statute, is not invalid simply because it "might have gone farther than it did." *Cf. Katzenbach* v. *Morgan*, 384 U.S. 641, 657 (1966); *Roschen* v. *Ward, supra*, 279 U.S. at 339. Moreover, when the court suggested in this regard that diversity could be increased in smaller communities by dropping in additional stations, 555 F. 2d at 966 (App. 430), it violated the principle that it is an agency's prerogative to choose among remedies. *Federal Communications Commission* v. *WOKO, Inc., supra*, 329 U.S. at 229; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953);

Consolo v. *Federal Maritime Commission*, 383 U.S. 607, 620–621 (1966); *Greater Boston Television Corp.* v. *Federal Communications Commission, supra*, 444 F. 2d at 857.[85]

The court's vacation of the Commission's divestiture rules was an improper use of its limited power to review. In short, it was entirely reasonable for the Commission to conclude that there was a *prima facie* lack of diversity and economic competition in those markets where divestiture was ordered, so as to make that remedy appropriate.

III. THE DECISION OF THE COURT OF APPEALS TO REMAND THE RECORD TO THE COMMISSION "FOR ADOPTION OF A RULE" WAS A USURPATION OF AN ADMINISTRATIVE FUNCTION

Even assuming, *arguendo*, that the Commission's decision was somehow irrational, the judgment below should still be reversed, for when the court of appeals not only reversed the Commission but remanded the record to the Commission "for adoption of a rule" compelling across-the-board divestiture, 555 F. 2d at 967 (App. 431), it "overstepped the bounds of its reviewing authority," *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976), and "usurped an administrative function," *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952). On remand the Commission might have formulated different rules or decided that no rule at all was appropriate in light of the court's legal interpretations. In foreclosing that option, the court committed plain error. It is well established that "the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration." *Federal Power Commission* v. *Idaho Power Co., supra* (citation omitted). *See also National Labor Relations Board* v. *Food Store Employees Union, Local 347*, 417 U.S. 1 (1974); *South Prairie Construction Co.* v. *Local 627, I.O.U.E.*, 425 U.S. 800 (1976).

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[85] In addition, the court's apparent endorsement of drop-ins is a further illustration of the self-contradictory nature of its analysis, for drop-ins are no more certain to produce diversity than is divestiture.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the order of the Commission affirmed.

Respectfully submitted,

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